Brief of Jones for Respondent

JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1898.

Filed Nov. 7, 1898.

In the Matter

of

The Petition of the ATLAS STEAMSHIP COMPANY for a Writ of *Certiorari* to the U. S. Circuit Court of Appeals for the Second Circuit.

In the Matter

of

The Application of CHARLES B. WHEELER for a Writ of *Certiorari* to the U. S. Circuit Court of Appeals for the Second Circuit.

MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR WRITS OF CERTIORARI.

EUSTIS, JONES & GOVIN,
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Memorandum in Opposition to Applications for Writs of Certiorari.

It is conceived that these two applications may be briefly disposed of by a few general observations and references to the case.

First.

The affidavit of Mr. Jones, one of the *Bourgogne's* proctors, shows not only that mandates have been issued from the Circuit Court of Appeals to the District Court in both these cases, but that the decree in the Wheeler case has been entirely satisfied. Furthermore, these two applications represent but a comparatively minor interest in the whole, because the major

portion of the litigants having satisfied the decrees as to them make no application for a writ of *certiorari*.

Second.

Every question involved in these cases is a pure *question of fact*. There is no new or controverted question of law in them.

The District Court and the Circuit Court of Appeals are unanimously of the same opinion upon all these questions of fact, and this Court has repeatedly held that it will not issue a writ of *certiorari* to review questions of fact.

See Compania La Flecha *v.* Brauer, 168 U. S., 104; and cases there cited.
Stuart *v.* Hayden, 169 U. S., 1.
Baker *v.* Cummings, *ib.* 198; and
Wuppermann *v.* the Steamship *Carib Prince* (not yet reported in the official reports but published in the N. Y. Law Journal, June 3rd, 1898).

Third.

The only two questions in the case which by any possibility could be given the aspect of questions of law are first, whether *La Bourgogne* was under the legal obligation to absolutely stop and anchor when she encountered the fog; and secondly, whether the *Ailsa* was legally at fault for anchoring outside the anchorage limits; but obviously these questions both resolve themselves into questions of prudent navigation independently of any questions of law and, therefore, present pure questions of fact.

Moreover, the rule of law that a vessel in a fog so dense that she cannot be navigated with safety shall come to anchor as soon as practicable is a rule of law

about which there is no question and which has been established by the repeated declarations of the Courts of England and this country for fully thirty years past. This rule of law is not denied. The real question here is whether the circumstances were such as to make that rule operative, and both the District Court and the Circuit Court of Appeals upon that question of fact decided that it was not operative.

Furthermore, as to the place of anchorage of the *Ailsa* there can be no question as to the law upon that subject. (See cases cited under Second Point of the *Bourgogne's* Brief in the Circuit Court of Appeals herewith presented.) But this is really a question of fact, namely, as to whether or not there was any necessity for the *Ailsa* to have anchored in an improper place, and the District Court and the Circuit Court of Appeals both decided unanimously that there was no such necessity.

Fourth.

There are one or two mis-statements of fact in the petitions which may be noticed. In the first place, the petition of the Atlas Steamship Company (fol. 16) and the petition of Wheeler (page 4) both state in substance that as the *Bourgogne approached* Quarantine she lost sight of Fort Hamilton, and the captain then said to the pilot that they ought to anchor, but the pilot decided not to anchor north of the Narrows, but to go through to Gravesend Bay.

This is an absolute mis-statement of the fact, because the evidence shows (*Bourgogne's* Brief in the Circuit Court of Appeals, pp. 15–16, submitted herewith), first, that there was no disagreement whatever between the captain and the pilot as to the place of anchorage; and, secondly, that the question of anchoring arose when the *Bourgogne* was *below* Quarantine, and when she, therefore, could not turn round in the channel

and anchor above Quarantine. This was the reason she went into Gravesend Bay, the usual place of anchorage, just as every other vessel did that went down that day in the same condition of the weather.

Fifth.

The petitions of both the Atlas Steamship Company and Wheeler also state (fol. 14 of the Atlas Co.'s Petition, paragraph fifth of Wheeler's petition) that the *Ailsa* while proceeding to anchor in Gravesend Bay heard bells of vessels at anchor ahead of her and not venturing to go further stopped and cast anchor, which is evidently their excuse for not going into Gravesend Bay.

This statement is shown by the evidence in the case to be absolutely an error (see *Bourgogne's* Brief in Circuit Court of Appeals, p. 45), there being no vessels anywhere near where the *Ailsa* anchored.

Sixth.

Great stress seems to be laid in the petition, as it was in both the District Court and in the Circuit Court of Appeals, upon the statement of the captain of the *Bourgogne* to the effect that he was sounding his whistle "almost continually," and it is sought to be argued here, as it was in the courts below, that this so deadened the capacity of the officers and men of the *Bourgogne* to hear other sounds that they could not hear the bell of the *Ailsa;* but the captain states distinctly (fol. 1619 of the Record) as to what he means by this expression in French "presque continuellement," by saying that it is perfectly evident that he did not have the whistle blown in such a manner that he could not hear what was going on, and furthermore, at fol. 1252 he states that the whistle was blown probably every twenty seconds, perhaps oftener.

But it is manifest that this expression, "Almost continually," made by the Captain of the *Bourgogne*, is one of those expressions which we find that even this Court, careful as it is in what it says, has at least on one occasion indulged in.

In the case of the *Colorado*, 1 Otto, 692, this Court, in defining the precautions to be taken by a vessel in a fog, uses the following words:

> "The best precautions are bright signal lights; very low speed—just sufficient to subject the vessel to the command of her helm; competent lookouts properly stationed and vigilant in the performance of their duties; *constant* ringing of the bell or blowing of the fog-horn, as the case may be, and sufficient force at the wheel to effect, if necessary, a prompt change in the course of the vessel."

We suppose that Captain Poirot will be as easily excused for this mode of expression as the Judges of this Court.

Seventh.

Counsel for the *Bourgogne* has had no opportunity to examine the briefs of the counsel for the petitioners in this case. He assumes, however, that in this Court the counsel have made as many mis-statements of fact as were made in the Circuit Court of Appeals. If the Court will examine our brief in the Circuit Court of Appeals under the Thirteenth Point (page 55) it will appear that the counsel made no less than fourteen different mis-statements of fact there, and we assume that there will be a like discrepancy between the real facts and the statements of counsel in their brief on this application.

Eighth.

It is not deemed necessary to go further into the case, and we, therefore, leave the matter, so far as the details of the case are concerned, to the brief in behalf of the *Bourgogne* in the Circuit Court of Appeals.

We respectfnlly submit that both applications should be denied.

EUSTIS, JONES & GOVIN,

Proctors for *La Bourgogne.*

EDWARD K. JONES,

Advocate.